THE MISSOURI CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT COLE COUNTY, STATE OF MISSOURI

CITY OF MARYLAND HEIGHTS, *et al.*,	)	
	)	
Plaintiffs,	)	
vs.	)	Case No. 19AC-CC00206
	)	
STATE OF MISSOURI,	)	
	)	
Defendant.	)	

ORDER AND JUDGMENT

Plaintiffs' Motion for Partial Summary Judgment on Counts II, III, and IV of their First Amended Petition was called for hearing on February 4, 2021. The parties appeared by counsel, at which time plaintiffs withdrew from consideration their argument for judgment on Count IV. After argument by counsel on Counts II and III and the consideration of the pleadings and supporting materials on file including argument in briefing of counsel, the Court enters this Order and Judgment on those Counts II and III.

I. Facts.

Plaintiff Ruth Springer is the mayor of the city of Olivette, Missouri, and plaintiff Missy Waldman is a member of the Olivette City Council. Plaintiff Edward Mahan is the mayor of Rock Hill, Missouri. Plaintiff G. Michael Moeller is the mayor of Maryland Heights, Missouri. Plaintiff Barbara Beckett is the administrator and clerk for the city of Winchester, Missouri. The individual plaintiffs challenge the constitutionality of Section 115.646 of the Revised Statutes of Missouri, specifically alleging violations of the 1st and 14th Amendments to the United States Constitution.[1]

[1] The plaintiffs' respective cities are also plaintiffs in this action, but their interest is limited to Count I of the petition, which seeks a judicial interpretation and declaration of the meaning of the terms of Section 115.646 RSMo.

Defendant State of Missouri has enacted Section 115.646, which prohibits public officials from using public funds to support or oppose any ballot measure or candidate for public office. The statute states:

> No contribution or expenditure of public funds shall be made directly by any officer, employee or agent of any political subdivision to advocate, support, or oppose any ballot measure or candidate for public office. This section shall not be construed to prohibit any public official of a political subdivision from making public appearances or from issuing press releases concerning any such ballot measure.

The violation of Section 115.646 is a class four election offense.[2] Upon conviction, violators are subject to imprisonment of up to one year in jail, or a fine of up to $2,500.00, or both. *§115.637 RSMo.* In addition, Section 115.646 may be enforced by the Missouri Ethics Commission, see Section 105.957.1(6) RSMo. and Gerard v. Board of Election Commissioners, 913 S.W.2d 88, 90 (Mo. App. 1995), subjecting the violator to civil fines.[3]

The individual plaintiffs have testified collectively that they have spoken publicly about past ballot measures affecting their cities. These include elections for the approval of new or increased taxes and for the issuance of bonds for public improvements. They have also spoken about the effects on their cities of a statewide ballot proposition, commonly known as "Better Together", that had circulated but was withdrawn in 2019. Plaintiffs have testified that their speech on these matters has included the use of city resources to publish and distribute postcards and newsletters to their constituents and to speak at city venues about the effects of the ballot measures at issue. Plaintiffs also expect

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[2] Section 115.641 RSMo. provides that "[a]ny duty or requirement imposed by the provisions of this chapter which is not fulfilled and for which no other or different punishment is prescribed shall constitute a class four election offense." Section 115.646 is part of Chapter 115 and provides no penalty for its violation.

[3] See Missouri Ethics Commission v. Jeff LaGarce, Case No. 15-0028-I, *Findings of Fact, Conclusions of Law and Order*, p. 14 (Plaintiffs' Ex. 5.A). See also §105.961.4(6) RSMo.

their cities to be confronted with future ballot measures, and they anticipate speaking publicly about the effects of those ballot measures on their respective cities and constituents.

The individual plaintiffs have also testified that they believe the terms of Section 115.646 to be vague, to the extent that they have edited and limited their past electoral speech. They have also expressed concern that they may be subject to prosecution under the statute for their past or future speech on local and/or statewide ballot measures and that, if so prosecuted, they will suffer the nuisance and expense of defense and will further risk a judgment of culpability, which might include criminal fines or imprisonment or civil sanctions. The individual plaintiffs contend in their summary judgment motion that the statute, on its face, violates their 1st Amendment right to speak on ballot measures and their 14th Amendment right to be free from the penal enforcement of a vague law.[4]

II. Legal Standard.

To be entitled to summary judgment under Rule 74.04, the plaintiffs must show: (1) that there is no genuine dispute as to the material facts on which they rely, and (2) based on those facts, they are entitled to judgment as a matter of law. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 380 (Mo. banc 1993).

The State of Missouri does not contest the plaintiffs' testimony concerning their public positions, their past speech on ballot measures affecting their communities, or the possibly of their speech on future ballot measures. But the State disagrees with the legal conclusions drawn by the plaintiffs concerning the statute and its constitutionality. As the material facts are not in dispute, the questions to be determined are whether the statute, as

[4] Plaintiffs do not challenge the constitutionality of Section 115.646 RSMo. as it pertains to candidates for office. This Order and Judgment accordingly does not address that issue.

a matter of law, violates the plaintiffs' constitutional rights under the 1st and 14th Amendments. "A statute is presumed to be constitutional and will not be invalidated unless it 'clearly and undoubtedly' violates some constitutional provision and 'palpably affronts fundamental law embodied in the constitution.'" Bd. of Educ. of City of St. Louis v. State, 47 S.W.3d 366, 368-69 (Mo. banc 2001).[5]

III. The First Amendment Claim.

A. Section 115.646 Regulates Speech Based On Content.

"The First Amendment . . . prohibits the enactment of laws abridging the freedom of speech". The State of Missouri accordingly "has no power to restrict expression because of its message, its ideas, its subject matter, or its content". Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.*

Section 115.646 plainly targets speech based on content. It prohibits the officials of political subdivisions—which the plaintiffs plainly are—from using public funds "to advocate, support, or oppose any ballot measure". One must examine the public official's words to determine whether the official is supporting or opposing a particular ballot

[5] The State has not pressed its claimed affirmative defenses of failure to state a claim, lack of standing, and mootness, and the Court finds that the plaintiffs' testimony of a prosecutorial threat arising out of both past and future elections is sufficient to overcome these defenses. See Planned Parenthood of Kansas v. Nixon, 220 S.W.3d 732, 737 (Mo. banc 2007)(plaintiff's legally protectable interest is its desire to exercise its First Amendment rights without being subject to civil liability), and Tupper v. City of St. Louis, 468 S.W.3d 360, 370 (Mo. banc 2015)(pre-enforcement challenge actionable when the underlying facts are fully developed and the law at issue affects the plaintiff in a manner that gives rise to an immediate, concrete dispute).

measure, and only then can the State enforce the statute through criminal or civil proceedings.

Indeed, the State does not, and cannot, contest this conclusion. The Missouri Attorney General has opined that to determine a statutory violation, one should "look to such factors as the style, tenor and timing of the publication". Mo. Attny. Gen. Opinion, No. 54-90 *(Plaintiffs' Ex.4).* The Missouri Ethics Commission has specifically embraced this approach. Missouri Ethics Commission v. Jeff LaGarce, Case No. 15-0028-I, Findings of Fact, Conclusions of Law and Order, pp. 11-14 (Plaintiffs' Ex. 5.A); Missouri Ethics Commission v. *Caldwell,* No. 10E041 (Nov. 16, 2011), p. 9 (Plaintiffs' Ex.5.B). And the Missouri Court of Appeals has acknowledged in dicta that a statutory violation can only be determined "by reference to the communications themselves", distinguishing between the "[d]issemination of purely factual information" and that which "advocate[s]", "support[s]" or "oppose[s]" a ballot measure. State ex rel. Wright v. Campbell, 938 S.W.2d 640, 644 (Mo. App. 1997).

Having concluded that Section 115.646 regulates speech based on its content, the next step would be to proceed to a "strict scrutiny" analysis, requiring the State to prove that the statute is "narrowly tailored to serve compelling state interests." Reed, 576 U.S. at 163. But first the State has interjected a blanket defense—that the 1st Amendment "does not apply to government speech".

B. The "Government Speech" Doctrine is No Defense.

The State argues that the speech at issue is "government speech" that, as a matter of law, lies beyond the reach of the First Amendment. Before addressing this argument, we must address the government speech doctrine.

The government speech doctrine was developed by the United States Supreme Court in the context of claims by taxpayers that their free speech rights were violated, either by the government's use of public funds to promote a specific viewpoint with which the taxpayers disagreed, or by the government's refusal to promote the taxpayer's specific viewpoint along with the government's own message. See Johanns v. Livestock Marketing Association, 544 U.S. 550 (2005)(use of beef assessments to promote generic, rather than specialty, beef did not violate specialty beef producers' First Amendment rights); Pleasant Grove City v. Summum, 555 U.S. 460 (2009)(religious organization had no First Amendment right to erect statute in a public park in which the government had erected other statuary).

In these and similar cases, courts have found that the First Amendment did not restrict the government from disseminating its own message and promoting its own point of view, because such communication was integral and necessary to the act of governing. Because the government could only speak by using public money, i.e., tax revenues, courts concluded that the government's need to speak on public matters outweighed the First Amendment rights of taxpayers who disagreed with the government's viewpoint or who sought an equal forum. In this context, the United States Supreme Court has declared that "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009).

Here, the State equates the speech regulated by Section 115.646, i.e., the prohibited electoral speech made by local government officers while using public funds, with "government speech". This allows the State to conclude that since the 1st Amendment

"does not regulate government speech", the State is free to prosecute those government officials for what they may say about local ballot measures. The Court disagrees.

Section 115.646 does not regulate "government speech". As expressed by the Supreme Court, government speech consists of the governmental right of the public entity

> to speak for itself. . . . It is entitled to say what it wishes . . . and to select the views that it wants to express. . . . It is the very business of government to favor and disfavor points of view. . . . To govern, government has to say something . . . .

Summum, 555 U.S. at 467-468 (citations and quotations omitted). On its face, Section 115.646 does not address the right or ability of Missouri's political subdivisions to promote their unique points of view. It does not prohibit local governments from using public funds for electoral advocacy, nor does it punish those entities for any statutory violation. The statute simply does not regulate what the Supreme Court has called "government speech".

Instead, Section 115.646 restricts the scope of what a political subdivision's officials, employees, and agents may say about a pending ballot proposition. It targets the government's speakers, threatening them with prosecution, imprisonment, fines, or civil sanctions based on whether they have advocated, supported, or opposed the ballot measure. The statute is not limited to the speech of those individuals who promote the government's viewpoint; rather it encompasses the speech of the targeted individuals regardless of that viewpoint ("advocate, support *or oppose*"), so long as it is spoken using the government's money. For example, a city council may call for an election on a tax increase and support its passage, but a mayor having a column in a monthly newsletter may nonetheless declare his or her opposition to the tax proposal. Both types of speech may violate the statute, but only the council's expressed viewpoint qualifies as "government speech". The speech prohibited by Section 115.646 is thus necessarily that of the individual government actors.

It is not "government speech", and it cannot be impervious to 1st Amendment challenge because of the government speech doctrine.

If the legislature had intended to limit the government's ability to speak on pending ballot measures, it could have easily done so by simply limiting the statute's application to political subdivisions. Political subdivisions have no 1st Amendment rights—see City of Chesterfield v. Director of Revenue, 811 S.W.2d 375, 377 (Mo. banc 1991)(municipalities are not "persons" protected by the 14th Amendment)—and Missouri would not be constitutionally restrained from passing a law that prohibited a local government from "advocating, supporting or opposing" a ballot measure. Such a law could be enforced by the Missouri Ethics Commission, allowing punishment for electioneering while permitting political subdivisions to engage in informational government speech, as contemplated by the Missouri Court of Appeals in Wright v. Campbell, 938 S.W.2d 640, *supra.*

But Section 115.646 instead targets the "officers, employees, and agents" of political subdivisions, requiring them to digest the statute's meaning and ramifications before commenting on any ballot measure. This implicates the 1st Amendment rights of the plaintiffs, and the government speech doctrine does not give the State carte blanche to prosecute them for what they may say.

C. Section 115.646 Fails The Strict Scrutiny Test.

In that the government speech doctrine does not excuse the statute's content-based regulation, the State must prove that the statute is narrowly tailored to serve a compelling government interest. It has failed to do so.

The State argues that Missouri "has a substantial compelling interest in assuring the fairness of elections and the appearance of fairness in the electoral process", but the State's

explanation of this interest—preventing political subdivisions from influencing the outcome of elections—has been disabused by the government speech cases. Indeed, the cases on which the State relies to establish its interests as compelling—Anderson v. City of Boston, 380 N.E.2d 628 (Mass. 1978) and Mountain State Legal Fund v. Denver Sch.Dist. No. 1, 459 F. Supp. 357 (D. Col. 1978)—precede the United States Supreme Court's government speech decisions by more than 20 years.[6]

Moreover, Missouri has enacted many statutory procedures and protections to ensure the fairness of elections[7], and Missouri's voters are intelligent enough to assess for themselves the truthfulness and the underlying motives and biases of election campaign claims. Indeed, voter awareness of such matters has been recognized by the United States Supreme Court:

> When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.

Board of Regents of University of Wisconsin System v. Southworth, 529 U.S. 217, 235 (2000). The State's fairness interests, while having some superficial legitimacy, are not compelling, and they cannot be used to justify the infringement of the plaintiffs' speech.

Neither is the statute "narrowly drawn" to achieve the State's professed fairness interests. As noted above, the statute fails to target the entity responsible for the harm that the State identifies—political subdivisions seeking to influence the outcome of elections—

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[6] In fact, the United States District Court of Oregon specifically disavowed Mountain State Legal Fund for that very reason. See Burwell v. Portland School District No. IJ, No. 3:19-cv-00385, 2019 WL 9441663, p. 5, n. 3 (U.S.D.C., D. Or. March 23, 2019).

[7] See Chapter 115 RSMo. and the litany of election offenses found in Section 115.629 through Section 115.637.

focusing instead on local government officials. And as noted in Part III below, the statute's vague and uncertain terms preclude any finding that it is "narrowly drawn" to serve the State's interest in fair elections.

In sum, the State has failed to satisfy the "strict scrutiny" test as required by Reed. Section 115.646 regulates the speech of the individual plaintiffs based on the content of that speech, and it is not narrowly tailored to serve a compelling government interest. It violates the 1st Amendment rights of the individual plaintiffs and is therefore unconstitutional and void.

III. Section 115.646 Violates The 14th Amendment's Due Process Clause.

It is "a basic principle of due process" under the Fourteenth Amendment that "a law is void for vagueness if its prohibitions are not clearly defined". Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Laws must (a) "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly" and (b) provide "explicit standards" for those who apply the contested law. *Id.*" Section 115.646 fails this test in multiple respects.

The term "ballot measure" is not defined, thus it is unclear when the statutory prohibition against advocacy begins. If it means a proposal actually appearing on a ballot, then—as incongruous as it seems—it follows that public moneys can be safely spent for election advocacy up to the printing of the ballot, even though the political subdivision had previously approved and crafted the ballot language, perhaps months before its submission to and certification by the election authority. If "ballot measure" means something less than an actual proposal certified for an election, then when do the statutory restrictions apply? When it's initially discussed by the political subdivision, when draft ballot language is

crafted, or when the language is approved by the subdivision for an election? The statute does not say, because the words "ballot measure" do not provide any guidance on when it is safe to advocate for an election result and when it is not.

Also undefined and ambiguous is the term "public funds". The State construes this term strictly as prohibiting "payment or disbursement of money received or controlled by a political subdivision", but this interpretation is at odds with other statutory definitions pertaining to campaign finance disclosures. Subsections 130.011(12) and (16) respectively define "contribution" and "expenditure" as encompassing "money or anything of value". And the State's interpretation also ignores the many decisions of record by the Missouri Ethics Commission, which recognize violations of Section 115.646 as including the cost of personnel time and the use of public copiers, printers, newsletters, fire engines, and fuel. E.g., see Plaintiffs' Exs. *5.A, 5.C, 5.F, 5. G and 5.J.* The uncertainty of the term "public funds" leaves both speakers and enforcers without a means by which to judge the legality of the medium used to make the speech in question.

The statute also fails to specify what is encompassed by a "contribution or expenditure . . . made directly" by a public official. Does a councilperson's vote to appropriate public funds qualify, even though a council majority is needed to approve the appropriation? Does the city manager's act of signing the check to implement the appropriation qualify, even though the council has authorized the expenditure? Does the city vendor's acceptance and use of appropriated funds to create a campaign pamphlet constitute a violation? Has the city clerk committed a crime by using a city computer to respond to a resident's inquiry on the effect of a pending ballot measure? The statute again leaves the reader with more questions than answers.

The operative terms of the statute, those prohibiting political subdivision officers from "advocat[ing], support[ing], or oppos[ing] any ballot measure", are also indefinite. There are no guidelines or standards, and they can only be applied—and in effect, defined retroactively—by relying on the contextual facts. That is, one can prepare a flyer or a postcard pertaining to an election, and that document may describe all of the benefits expected from a successful outcome, but it may nonetheless be deemed to have slipped into the realm of advocacy or support, depending on any number of factors. Such factors can include all aspects of the literary or graphic representations, including the words chosen (neutral or descriptive), typeface, font size, punctuation, photography, illustrations, and arrangement of communicative elements, in addition to the amount of information provided. For example, to avoid "advocacy" or "support" of a measure, does the statute require a government publication to include both sides of every electoral question? Does the statute require the speaker to *knowingly* advocate, support, or oppose a ballot proposition, or can liability be found regardless of the speaker's intent?

In some cases the answer will be plain as to whether speech is informationally neutral or constitutes advocacy, support, or opposition, but answers in most cases will be more elusive, especially the more effective one is at communicating. A skilled writer can create a campaign piece that contains language, punctuation, font size, and germane "facts" that are neutral on their face, but taken together, lead only to one conclusion—an unstated exhortation to vote for or against a ballot measure. Would that constitute advocacy? The statute simply provides no concrete means by which to judge, either as a speaker or as an enforcement officer, whether the speech in question subjects the speaker to criminal or civil penalty.

Vague statutes that inhibit the exercise of free speech understandably cause speakers to say far less than that which they might say if the boundaries were clearly drawn; in such circumstances the 14th Amendment requires precision, for notice both to the speaker and to the enforcing officers, as to what is and is not legal. Ferguson Police Officers Association v. City of Ferguson, 670 S.W.2d 921, 927-928 (Mo. App. 1984)(city charter provision prohibiting the "sponsoring" of political candidates void for vagueness). Here, Section 115.646 is vague in any number of respects. It violates the plaintiffs' due process rights under the 14th Amendment, and consequently it is held void.

IV. Order and Judgment

Plaintiffs Springer, Waldman, Mahan, Moeller, and Beckett are granted judgment on Counts II and III of their First Amended Petition. Section 115.646 RSMo. is declared unconstitutional and void, and the State of Missouri is enjoined from its enforcement. In light of this disposition, Counts I and IV of the plaintiffs' First Amended Petition are declared moot and are hereby dismissed.

SO ORDERED:

Honorable Cotton Walker
Circuit Court Judge

April 24, 2021
Date